RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,
Petitioner,

v.

JOHN GUIDO AND DENNIS RANKIN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Age Discrimination in Employment Act (ADEA) defines certain private and public entities as "employers" and prohibits them from discriminating against employees because of their age. The Act applies to private entities only if they had "twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. § 630(b).

The question presented is:

Under the ADEA, does the same twenty-employee minimum that applies to private employers also apply to political subdivisions of a State, as the Sixth, Seventh, Eighth, and Tenth Circuits have held, or does the ADEA apply instead to all State political subdivisions of any size, as the Ninth Circuit held in this case?

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INTRODUCTION

For decades, the courts of appeals have read the Age Discrimination in Employment Act (ADEA) to cover both private businesses and State political subdivisions only if they have at least twenty employees. That uniform threshold for federal liability has permitted the States to calibrate age discrimination policies for small private and public employers alike. Perhaps most importantly, the States have judged how best to regulate their special districts—a class of small, modestly funded political subdivisions that provide vital services like fire protection to local communities.

In this case, the Ninth Circuit displaced those longstanding State judgments. Expressly splitting from every other circuit to consider the issue, the court read the ADEA to cover *all* political subdivisions, no matter how small—even though the statute exempts private businesses with fewer than twenty employees. As to small special districts, therefore, the court replaced the varying age discrimination policies of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington with a one-size-fits-all federal standard.

The Ninth Circuit's unprecedented construction of the ADEA has generated several inexplicable rifts in federal antidiscrimination law. For one, the ADEA's coverage is now far broader within the Ninth Circuit than outside it. That means the powers of California and Nevada have been curbed more significantly than those of Utah and Colorado, merely because of geographic happenstance. Further, within

the Ninth Circuit, the ADEA's coverage is now markedly uneven. The statute covers the smallest public employers but exempts similarly sized private entities—even when the two perform comparable functions. That disparity is particularly puzzling in light of Title VII, which prohibits other forms of workplace discrimination. Title VII indisputably covers both private entities and State political subdivisions only if they have at least fifteen employees. Under the Ninth Circuit's reading, the ADEA's coverage would be *less* extensive than Title VII's for private employers, but *more* extensive for public employers—an illogical inconsistency between otherwise parallel statutes.

These rifts in antidiscrimination law are not the work of Congress. Rather, they are the product of the Ninth Circuit's flawed brand of textualism—a methodology that construed fragments of the ADEA in isolation rather than reading the statute's words "in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016); *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012). When the ADEA is interpreted holistically, as this Court requires, it must carry the narrower meaning endorsed by the other courts of appeals: State political subdivisions, like private entities, are subject to federal age discrimination liability only if they have twenty or more employees.

This case presents the Court with an opportunity to reaffirm fundamental canons of statutory interpretation and repair unprecedented ruptures in the framework of federal antidiscrimination law. The Court should grant certiorari and reverse the decision below.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 859 F.3d 1168 and reproduced at Pet. App. 1a-17a. The district court's unpublished decision is reproduced at Pet. App. 18a-37a.

JURISDICTION

The Court of Appeals entered judgment on June 19, 2017. Pet. App. 1a. On August 30, 2017, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including October 18, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the definitions of "person" and "employer" under the ADEA, 29 U.S.C. §§ 630(a)-(b). Section 630 is reproduced in full at Pet. App. 38a-42a. The parallel section of Title VII, 42 U.S.C. § 2000e, is also reproduced in full at Pet. App. 43a-47a.

STATEMENT OF THE CASE

1. The ADEA generally prohibits covered employers from taking adverse employment-related actions because of an employee's age. *See* 29 U.S.C. § 623. As originally enacted in 1967, the statute applied only to private entities. That narrow scope stemmed from the specific definitions of two statutory terms: "person" and "employer." A person meant (and still means) "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, le-

gal representatives, or any organized groups of persons." Pub. L. No. 90-202, § 11(a), 81 Stat. 602, 605 (1967).

The original ADEA defined "employer," in turn, by narrowing the reach of the term "person":

> The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.... The term also means any agent of such a person, but such term does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof.

Id. § 11(b), 81 Stat. 605. This definition expressly excluded three groups of employers that the statute might otherwise have covered. The first group was defined by activity: entities that did not engage in "an industry affecting commerce." The second group was defined by size: entities with fewer than twenty-five employees. And the third group was defined by governmental affiliation: the federal government, federally owned corporations, the States, and smaller political subdivisions. Taken together, these exclusions meant that the ADEA applied only to certain private employers with at least twenty-five employees.

In 1974, however, Congress amended these sections of the ADEA with language that remains in force today. *See* Pub. L. No. 93-259, § 28(a)(1)-(2), 88 Stat. 55, 74 (1974), *codified at* 29 U.S.C. § 630(b). The amendment retained the original definition of "person." *See* 29 U.S.C. § 630(a). But it narrowed two of the exclusions contained within the definition of "employer":

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.... The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

Id. § 630(b). The first exclusion, for entities that do not engage in "an industry affecting commerce," remains intact. But the second exclusion, based on size, now applies only to entities with fewer than twenty employees, rather than the original twenty-five. And the provision directly at issue in this case, the third

exclusion based on governmental affiliation, now applies only to the federal government and federally owned corporations.[1]

The 1974 amendment made clear that States and political subdivisions of States are no longer categorically excluded from the ADEA's coverage. *See Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (citing *EEOC v. Wyoming*, 460 U.S. 226 (1983)). But the amendment's syntax raised a question about the reach of local governmental liability under the statute: whether the twenty-employee minimum, which indisputably applies to private employers, also applies to State political subdivisions.

Prior to this litigation, every court of appeals to confront that question—the Sixth, Seventh, and Eighth Circuits—reached the same answer: The statutory text is ambiguous, but is best read to impose the same twenty-employee threshold on State political subdivisions that it imposes on private employers. *See Palmer v. Ark. Council on Econ. Educ.*, 154 F.3d 892, 896 (8th Cir. 1998); *EEOC v. Monclova Twp.*, 920 F.2d 360, 362-63 (6th Cir. 1990); *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270-73 (7th Cir. 1986).

2. This case raises precisely this question about the ADEA's scope. In Arizona, as in many States, residents depend on State political subdivisions called special districts for a range of vital services. These districts are generally created by petition of, and often staffed by, local property owners or officials. *See*

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[1] Federal employers are covered by a separate section of the ADEA. *See* 29 U.S.C. § 633a.

Ariz.Rev.Stat. Ann. § 48-261. Their budgets are independent, drawn primarily from local property taxes. *Id.* And each district provides a particular service to the local community: fire prevention, electricity, irrigation, waste management, water conservation, pest control, or any of dozens of other functions authorized by statute. *See id.* §§ 48-301–48-6819. These entities, which are typically small in size, abound. According to the U.S. Census, as of 2012, there were 38,266 special districts[2] nationwide, performing a vast range of functions. U.S. Census Bureau, *Special District Governments by Function and State: 2012* (hereinafter "*Special District Governments*") (Sept. 26, 2013), http://tinyurl.com/y8bdha3h; U.S. Census Bureau, *Individual State Descriptions: 2012* (hereinafter "*State Descriptions*") at x (Sept. 2013), http://tinyurl.com/ybk3q2wh.

Petitioner Mount Lemmon Fire District ("Mount Lemmon") is one of Arizona's special fire districts. It is part of a patchwork of similar districts across the State, each authorized to provide fire protection in a particular community. Ariz.Rev.Stat. Ann. § 48-805(B)(1); *see* Tucson Fire Foundation, *Fire Departments and Fire Districts in Arizona* (Nov. 4, 2009), http://tinyurl.com/yah5b2v3. Many of these fire dis-

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[2] The U.S. Census defines "special district governments" as "[o]rganized local entities other than county, municipal, township or school district governments" that "are authorized by state law to provide only one or a limited number of designated functions, and with sufficient administrative and fiscal autonomy to qualify as separate governments." U.S. Census Bureau, *Lists & Structure of Governments*, http://tinyurl.com/y8zz8tbj.

tricts, including Mount Lemmon, have modest budgets. *See* Ariz.Rev.Stat. Ann. § 48-807; Arizona Fire District Association, *Fiscal Year 2017/2018 Fire District Required Budget Postings*, http://tinyurl.com/y7sybnva. Yet the services they provide are essential—particularly in Arizona, a State under constant threat of large wildland blazes.

Like many of its peer districts, Mount Lemmon is (by necessity) leanly staffed. In 2009, it had just eleven full-time employees. Mount Lemmon's Rule 56.1 Statement of Facts at ¶ 16, *Guido v. Mount Lemmon Fire. Dist.*, No. 13-cv-00216-TUC-JAS (D. Ariz. Aug. 8, 2014), ECF No. 69. So when a drop in property tax revenue created a budget shortfall, Mount Lemmon went to great lengths to avoid further cutbacks in personnel. It sought out additional revenue from every available source, ranging from bake sales to supplemental work in wildland territory on behalf of federal authorities. *Id.* ¶¶ 1-11. But those efforts fell short; in 2009, Mount Lemmon was forced to reduce annual expenses by tens of thousands of dollars. *Id.* ¶ 12. It did so by laying off the respondents, John Guido and Dennis Rankin, for six months. Both of them had been hired by Mount Lemmon in 2000, when Guido was in his late-thirties and Rankin his mid-forties. At the time of the layoffs, Guido was 46 years old and Rankin 54. *See* Pet. App. 19a-20a.

Respondents allege that they were impermissibly laid off because of their age. The Arizona Civil Rights Act, which applies to a wide swath of the State's political subdivisions, bars discrimination on the basis of age. Ariz.Rev.Stat. Ann. §§ 41-1461, 1463(B). But

the respondents commenced litigation instead under federal law, invoking the ADEA.

3. Respondents filed this federal age discrimination suit in 2013. After discovery, Mount Lemmon moved for summary judgment. It argued, in relevant part, that the ADEA applies to State political subdivisions only if they have at least twenty employees—a threshold that Mount Lemmon, with its full-time staff of eleven, did not meet. The district court agreed. Following the Sixth, Seventh, and Eighth Circuits, the court concluded that § 630(b)'s text is ambiguous, but is best read to impose the same twenty-employee minimum on State political subdivisions that it imposes with respect to private employers. Pet. App. 20a-26a. The district court then reviewed Mount Lemmon's employment records and held, as a matter of law, that the fire district had fewer than twenty employees in the relevant time period, thereby excluding it from the ADEA's coverage. Pet. App. 26a-37a. The district court thus granted Mount Lemmon's summary judgment motion.

Respondents appealed. Challenging a unanimous body of circuit precedent, they argued that § 630(b) unambiguously subjects State political subdivisions of any size to the ADEA's coverage. Respondents also argued that Mount Lemmon was liable under the prevailing reading of the statute because it had at least twenty employees during the relevant time period. While the appeal was pending, a fourth court of appeals—the Tenth Circuit—joined the Sixth, Seventh, and Eighth Circuits in unanimously construing § 630(b) as ambiguous but best read to cover State political subdivisions only if they have twenty or more

employees. *See Cink v. Grant Cty.*, 635 F. App'x 470, 474 n.5 (10th Cir. 2015).

The Ninth Circuit reversed the district court's ruling for Mount Lemmon. It recognized that "four other circuits have considered this issue and all have declared § 630(b) to be ambiguous." Pet. App. 11a. But the court expressly split from its sister circuits in favor of a novel construction of the statute. Concluding that "§ 630(b) is not ambiguous," the Ninth Circuit held that it applies to all State political subdivisions, no matter how small, "[a]s a matter of plain meaning." Pet. App. 13a-14a. In the court's view, the contrary reading endorsed by unanimous panels of the Sixth, Seventh, Eighth, and Tenth Circuits was too "underwhelming" to be "deemed reasonable." Pet. App. 12a-13a.

The Ninth Circuit then deepened the circuit split even further. As an alternative ground for its decision, the court held that even if the ADEA were ambiguous, "[t]he best reading of the statute would be that the twenty-employee minimum does not apply to a political subdivision of a State." Pet. App. 14a. In reaching that holding, the Ninth Circuit squarely rejected the evidence of statutory purpose on which the Sixth, Seventh, Eighth, and Tenth Circuits relied in reading the statute more narrowly. Pet. App. 14a-17a.

Having so construed the ADEA, the Ninth Circuit declined to review the district court's conclusion that Mount Lemmon had fewer than twenty employees during the relevant time period. Pet. App. 17a. The court's interpretation of § 630(b)'s scope was thus the sole ground for its decision.

REASONS FOR GRANTING THE WRIT

I. The Question Presented Has Irreconcilably Divided The Courts Of Appeals.

The division of authority on the question presented is clear and undisputed. Five federal circuits—including two very recently—have addressed the extent to which political subdivisions of a State qualify as employers under the ADEA. These courts have reached diametrically opposed conclusions on two distinct issues: whether the meaning of "employer" under § 630(b) is ambiguous, and—if it is—whether the term is best read to encompass State political subdivisions only if they have twenty or more employees. The Court should grant this petition to resolve that acknowledged and intractable division of circuit court authority.

A. The Sixth, Seventh, Eighth, and Tenth Circuits construe § 630(b) as ambiguous and best read to cover State political subdivisions only if they have twenty or more employees.

The Sixth, Seventh, Eighth, and Tenth Circuits hold that the reference to State political subdivisions in § 630(b)'s second sentence can reasonably be read in two different ways. First, it could be construed "merely ... to make it clear that states and their political subdivisions are to be *included*" in the preceding "definition of 'employer,'" on the same terms as private entities. *Kelly*, 801 F.2d at 270-71; *see Palmer*, 154 F.3d at 896; *Monclova*, 920 F.2d at 362-63. Under that construction, § 630(b)'s second sentence does not

separately define all political subdivisions as a distinct category of employers. Rather, it clarifies that political subdivisions are no longer categorically excluded from coverage, as they had been under the original ADEA. *Cf.* Pub. L. No. 90-202, § 11(b), 81 Stat. 605.

Alternatively, these circuits have suggested, § 630(b) could perhaps be read to define *all* political subdivisions as employers by "setting" them "in a separate sentence" that does not expressly reiterate the twenty-employee minimum. *Kelly*, 801 F.2d at 270; *see Palmer*, 154 F.3d at 896; *Monclova*, 920 F.2d at 362-63. So construed, § 630(b)'s second sentence would do more than eliminate the prior exclusion of all State political subdivisions from the ADEA's reach; it would also affirmatively subject those subdivisions to far more expansive federal age discrimination coverage than their private-employer counterparts.

To decide which of those competing interpretations should prevail, the Sixth, Seventh, Eighth, and Tenth Circuits examined the ADEA's current and prior text, its purposes and legislative history, and its relationship to other federal anti-discrimination statutes. *Kelly*, 801 F.2d at 270-73; *Palmer*, 154 F.3d at 896-97; *Monclova*, 920 F.2d at 362-63. The courts uniformly concluded that those considerations dispositively favor the narrower construction: The ADEA applies to State political subdivisions, like private employers, only if they have at least twenty employees.

More specifically, these circuits first pointed to substantial evidence that the 1974 ADEA amendment

was designed to create parity in § 630(b)'s coverage of private and governmental employees. For example, when Senator Bentsen—the amendment's sponsor—first proposed revisions to § 630(b)'s definition of "employer" in 1972, he referred to the "principle[]" that "employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy." 118 Cong. Rec. 15894-95 (May 4, 1972); *see Monclova*, 920 F.2d at 363; *Kelly*, 801 F.2d at 271. The next year, a special Senate committee examined ways to improve the ADEA and concluded: "[I]t is difficult to see why one set of rules should apply to private industry and varying standards to government." Special S. Committee on Aging, 93d Cong., Improving the Age Discrimination Law 17 (Comm. Print 1973); *see Kelly*, 801 F.2d at 271-72. And in urging the president to sign the 1974 amendment into law, Senator Bentsen reiterated that "passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment based on age as are employees in the private sector." 120 Cong. Rec. 8768 (Mar. 28, 1974); *see Monclova*, 920 F.2d at 363; *Kelly*, 801 F.2d at 272. Notably, no congressional report "drew any distinction between the coverage of public and private employers." *Kelly*, 801 F.2d at 272.

The Sixth, Seventh, Eighth, and Tenth Circuits next noted that Congress's 1974 ADEA amendment was intended to mirror the effect of its 1972 amendment to Title VII. As this Court has recognized, "[t]here are important similarities between the two statutes, ... both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions." *Lorillard v. Pons*, 434 U.S.

575, 584 (1978). Initially, both the ADEA and Title VII applied only to private employers with at least twenty-five employees. Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253 (1964); Pub. L. No. 90-202, § 11(b), 81 Stat. 602, 605 (1967). In 1972, however, Congress amended § 701 of Title VII to extend coverage to the States and smaller State political subdivisions—subject to the revised fifteen-employee minimum that also applies to private employers. Pub. L. No. 92-261, § 701(b), 86 Stat. 103 (1972); *see Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977). In amending the ADEA's substantive prohibitions, Senator Bentsen expressly invoked that same parity for public and private employees, explaining that "the principles underlying [the 1972 Title VII amendment] are directly applicable to the Age Discrimination in Employment Act." 118 Cong. Rec. 15895; *see Kelly*, 801 F.2d at 271.

Moreover, and relatedly, applying the ADEA to State political subdivisions regardless of size "would lead to some anomalous results" within the broader framework of federal antidiscrimination law. *Kelly*, 801 F.2d at 273. In the private sector, Title VII's coverage is indisputably broader than the ADEA's—it reaches businesses with at least fifteen employees, where the ADEA requires twenty employees. In the Seventh Circuit's view, that distinction reflects that Congress "viewed the problems addressed by Title VII ... to be more serious than the problem of age discrimination." *Id.* (citing *Wyoming*, 460 U.S. at 231). If the ADEA applied to State political subdivisions of any size, however, that statutory hierarchy would be inverted in the public sector. The ADEA would have "much broader coverage ... than Title VII," which also

applies its fifteen-employee minimum to States and their political subdivisions. *Id.* The Seventh Circuit rejected that result as incoherent, noting that the ADEA's legislative history provides "no support whatsoever" for altering the relationship between the two statutes depending on the nature of the employer. *Id.*

In light of these considerations, the Sixth, Seventh, Eighth, and Tenth Circuits all concluded—in unanimous panel decisions—that the ADEA applies only to those State political subdivisions that have twenty or more employees.[3]

B. In stark contrast, the Ninth Circuit construes § 630(b) as unambiguously covering (or, alternatively, best read to cover) all State political subdivisions, no matter how small.

The Ninth Circuit recognized that twelve appellate judges had unanimously "declared § 630(b) to be ambiguous" regarding its coverage of State political subdivisions. Pet. App. 11a. But the court explicitly rejected that longstanding consensus. Consciously departing from its four sister circuits, the Ninth Circuit held that § 630(b) unambiguously applies to all State political subdivisions, no matter how small. Pet. App.

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[3] A district court within the Fourth Circuit has reached the same conclusion. *Smith v. Wythe-Grayson Reg'l Library Bd.*, 657 F. Supp. 1216, 1219 (W.D. Va. 1987).

14a.[4] The court then further deepened the split by holding, in the alternative, that even if the statute were ambiguous, it would be best read to cover State political subdivisions of any size. *Id.*

The Ninth Circuit reasoned that § 630(b) must be read to create "three distinct categories" of employers that are liable under the ADEA. Pet. App. 7a. The first is a certain type of "person," defined in § 630(b)'s first sentence. Pet. App. 6a. The second is an "agent of [a] person," defined in the first clause of § 630(b)'s second sentence. *Id.* And the third consists of "State-affiliated entities," defined in the second clause of § 630(b)'s second sentence. *Id.* In the Ninth Circuit's view, those categorical distinctions are mandated by the word "also" at the beginning of § 630(b)'s second sentence. Pet. App. 7a-8a.

The Ninth Circuit then characterized the statute's twenty-employee threshold as "clarifying language" for the first category of employers (persons). Pet. App. 6a-7a. And it concluded, as a matter of "ordinary meaning," that such clarifying language could not also apply to the third category of employers (States and smaller political subdivisions). Pet. App. 7a-8a. The court justified this conclusion primarily through analogies to a pair of hypothetical texts—one defining the term "password," the other defining "bank." *Id.*; *see infra* at 27-28.

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[4] A district court within the Eleventh Circuit has also concluded that the ADEA covers all political subdivisions, regardless of size. *Holloway v. Water Works & Sewer Bd. of Town of Vernon*, 24 F. Supp. 3d 1112, 1117 (N.D. Ala. 2014).

Beyond those two hypotheticals, the Ninth Circuit sought to bolster its novel construction of § 630(b) by noting that Congress had failed to unambiguously *apply* the twenty-employee threshold to State political subdivisions. The court suggested that Congress could have "added the limiting language" requiring at least twenty employees "to each definition discussed in § 630(b), or at least to the definition covering political subdivisions, but it chose not to." Pet. App. 10a. Alternatively, the court contended, Congress could have amended the definition of "person" to explicitly list "political subdivisions." Pet. App. 10a, 15a. In the court's view, Congress's failure to legislate in those particular terms confirmed that § 630(b) could *only* be read *not* to apply the twenty-employee minimum to State political subdivisions. *Id.*

The Ninth Circuit then deepened its split from the Sixth, Seventh, Eighth, and Tenth Circuits by reaching its alternative holding: that even if § 630(b) *were* ambiguous, "[t]he best reading of the statute would be that the twenty-employee minimum does not apply to a political subdivision." Pet. App. 14a. In doing so, the court considered, but dismissed, the evidence of statutory purpose on which its sister circuits relied in reading the statute more narrowly. In particular, the Ninth Circuit acknowledged that the Senate's 1973 special committee report "discuss[ed] how the same set of rules should apply to the private sector and the government," and that "a House report" and "statements by Senator Bentsen" contained similar language. Pet. App. 15a-16a. But the court concluded that those sources failed to "address the specific question before us" because they referred to "rules" generally, rather than stating specifically "that the twenty-

employee minimum should apply to political subdivisions" on the same basis that it applies to private employers. *Id.*

The Ninth Circuit relied instead on a comparison between the ADEA and Title VII. As noted, Title VII originally applied only to private employers with at least twenty-five employees. Pub. L. No. 88-352, § 701(b), 78 Stat. 253. In 1972, Congress amended Title VII to cover private employers, States, and political subdivisions with at least fifteen employees. Pub. L. No. 92-261, §§ 2(1)-(2), 86 Stat. 103; *see* 42 U.S.C. § 2000e. The text of that amendment differed in certain respects from the subsequent 1974 amendment to the ADEA—just as the two statutes differed in their original, pre-amendment language. *See infra* at 34-36. On that basis, the Ninth Circuit concluded that Congress must have intended the ADEA to apply more broadly than Title VII, as it otherwise would certainly "have used the same language" in both statutes. Pet. App. 15a.

The Ninth Circuit's split from its sister circuits is thus clear and comprehensive. The court expressly considered, but squarely rejected, the grounds on which the Sixth, Seventh, Eighth, and Tenth Circuits declared that § 630(b) is ambiguous. And in reaching its alternative holding, the Ninth Circuit also considered and rejected the indicia of statutory purpose that led the Sixth, Seventh, Eighth, and Tenth Circuits to decide that § 630(b)—if ambiguous—is best read to apply the statutory twenty-employee threshold to State political subdivisions. The two sides of the split have weighed all the same arguments. They simply read § 630(b) in irreconcilably different ways.

II. The Question Presented Is Important And Recurring.

Before the Ninth Circuit's decision in this case, the ADEA had consistently been read to cover State political subdivisions only if they had twenty or more employees. That uniform federal threshold allowed the States to calibrate age discrimination policies for their unique networks of small political subdivisions, including special districts. Most States—Arizona among them—have opted to prohibit age-based employment decisions by some of the small governmental entities beneath the ADEA's twenty-employee floor. But the precise thresholds for liability vary. *Compare, e.g.*, Ariz.Rev.Stat. Ann §§ 41-1461, 41-1463 (prohibiting age discrimination by political subdivisions only if they have at least fifteen employees) *with* Ore.Rev.Stat. Ann. §§ 659A.001, 659A.030 (prohibiting age discrimination by all political subdivisions).

The Ninth Circuit's decision splits what should be one uniform federal framework into two competing regimes. In Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, the ADEA now covers all State political subdivisions, even very small ones. That means a one-size-fits-all federal standard has displaced State judgments about how best to regulate small political subdivisions, including special districts—like Mount Lemmon—that provide critical services to local communities. In the remainder of the country, the ADEA, like Title VII, covers only larger State political subdivisions.

Resolving this rift in the applicability of federal age discrimination law is a matter of vital importance. As long as the division of authority stands, the relationship between the federal government and the States will vary dramatically based on geographical happenstance. Congress will, in effect, have curbed the powers of California and Nevada much more significantly than those of Utah and Colorado. And that discrepancy affects a fundamental aspect of State sovereignty: the regulation of political subdivisions authorized by state statute to provide fire prevention, electricity, waste management, and dozens of other services to residents. Only this Court can correct that arbitrary tilt in the federal balance.

Until the Court intervenes, the question presented is sure to recur. Special districts—just one kind of State political subdivision—exist in great numbers. As noted, in 2012, there were 38,266 of them nationwide, performing a vast range of functions. *Special District Governments*, *supra*; *State Descriptions*, *supra*, at x. Many of these districts have fewer than twenty employees.[5] And as of 2012, nearly a fifth of them—7,247—were located within the Ninth Circuit. *See State Descriptions*, *supra*, at 9, 11, 24, 74-76, 176, 186, 234, 291.

In short, a substantial number of small districts (unlike their private-employer counterparts) now face

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[5] For example, by our count, Illinois publicly reported 1671 special districts with full-time or part-time employees in 2016, and over 60% of them had fewer than twenty such employees. *See* Illinois Comptroller, *Financial Databases*, http://tinyurl.com/yb36wnoc.

the prospect of ADEA lawsuits fueled by the Ninth Circuit's decision in this case. Such litigation is sure to proliferate, and will necessarily raise the question presented here. It will also impose new financial burdens on the local governmental units least equipped to afford them, threatening the continued availability of the essential services they provide. *See Kelly*, 801 F.2d at 272 n.3 (noting that Illinois park districts "are independent of other larger governmental entities and thus operate on limited budgets"). The need for the Court's review of this circuit split is thus particularly pressing.

III. The Ninth Circuit Erred In Holding That § 630(b) Covers State Political Subdivisions Of Any Size.

The Ninth Circuit split from the unanimous consensus of four sister circuits only by employing a flawed brand of textualism that defies this Court's precedents. "Statutory language cannot be construed in a vacuum." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). Rather, it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.*; *see Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004); *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). The Ninth Circuit did just the opposite here. It construed fragments of § 630(b) in isolation and "in the abstract," *Sturgeon*, 136 S. Ct. at 1070, ignoring other portions of the statute that cut squarely against the court's unprecedented interpretation.

When § 630's text and structure are construed holistically, as this Court requires, the Ninth Circuit's broad reading proves indefensible. That conclusion is confirmed by the purposes and history of the ADEA, both standing alone and in relation to Title VII.

A. The text and structure of § 630 establish that State political subdivisions are "employers" only if they have twenty or more employees.

Two features of § 630 demonstrate that the statute is best read to cover only those State political subdivisions with twenty or more employees, as the Sixth, Seventh, Eighth, and Tenth Circuits have held. The Ninth Circuit failed to account for either feature.

1. First, the opening clause of § 630(b)'s second sentence provides that the term "employer" under the ADEA "also means (1) any agent of such a person." The Ninth Circuit noted in passing that under its novel construction of the statute, this "agent" clause—like the subsequent reference to political subdivisions within the same sentence—must be read to create a "distinct categor[y]" of employers liable under the ADEA. Pet. App. 7a. But the court never considered whether that reading of the "agent" clause was viable, let alone unambiguously correct. It thus failed to confront a critical flaw in its interpretation of § 630(b): Construing "agents" as a distinct category of employers would vastly expand the ADEA's scope in a way that every court of appeals to consider the question—including the Ninth Circuit itself—has expressly rejected.

Under the ADEA, any "employer" who violates the statute's prohibitions "shall be liable to the employee or employees affected" for backpay and damages, along with equitable relief. 29 U.S.C. § 216(b) (incorporated into the ADEA by § 626(b)). If § 630(b)'s "agent" clause defined a distinct category of employers, therefore, agents of a qualifying "person" would be independently liable for age discrimination. That would include, for example, supervisory personnel who act as agents for their organizations in making and carrying out employment decisions. Several employees have indeed sued their supervisors under precisely that theory. And some of them initially prevailed after district courts concluded—as the Ninth Circuit did here—that the "agent" clause was most naturally read to create a distinct category of employers who can be subject to ADEA liability in their own right. *See House v. Cannon Mills Co.*, 713 F. Supp. 159, 161-62 (M.D.N.C. 1988) (concluding that the ADEA's "express language" imposed "personal liability on all 'employers,'" including qualifying agents); *Elias v. Sitomer*, No. 91 CIV. 8010 (MBM), 1992 WL 370419, at *5 (S.D.N.Y. Dec. 7, 1992) (similar).

Ultimately, however, every court of appeals to consider the issue, including the Ninth Circuit itself, has read the "agent" clause more narrowly: as an "unremarkable expression of respondeat superior" liability for "persons" who qualify as employers under § 630(b)'s first sentence. *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir.), *cert. denied*, 513 U.S. 1058 (1994); *see Sabouri v. Ohio Dep't of Educ.*, 142 F.3d 436, at *2 (6th Cir. 1998) (unpublished); *Martin v. Chem. Bank*, 129 F.3d 114, at *3 (2d Cir.

1997) (unpublished); *O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060, 1066 n.8 (7th Cir. 1997); *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996); *Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994).[6] These decisions do not dispute that the "agent" clause, in isolation, could naturally be read to describe a distinct category of "employers" liable under the ADEA. But they conclude that such a reading would be "incongruous" in light of the broader statutory scheme, which seeks to exempt small entities from the "burden" of federal liability. *Birkbeck*, 30 F.3d at 510.

The courts of appeals thus agree that the ADEA's "agent" clause describes a particular mechanism for holding qualifying "persons" liable—and not a distinct category of liable employers. In other words, the opening clause of § 630(b)'s second sentence merely clarifies the scope of the statute's first sentence. The Ninth Circuit implicitly rejected that longstanding consensus in this case. It concluded that § 630(b)'s second sentence—including the "agent" clause—could not be read to "clarify the previous definition" of "employer." Pet. App. 7a. But the court never explained why that was the best reading of the "agent" clause, let alone the only reasonable one. It did not purport to find fault with prior circuit case law (including its own decision in *Miller, supra*) that reads the "agent" clause

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[6] The courts of appeals have also uniformly concluded that Title VII's analogous "agent" clause, 42 U.S.C. § 2000e(b), "does not cover a supervisor in his personal capacity." *Yesudian ex rel. United States v. Howard Univ.*, 270 F.3d 969, 972 (D.C. Cir. 2001) (collecting cases).

more narrowly to avoid "incongruous" results. *Birkbeck*, 30 F.3d at 510. Instead, the Ninth Circuit simply ignored the implications of its statutory construction for the "agent" clause. In doing so, it failed to read the words of the statute "in their context and with a view to their place in the overall statutory scheme," as this Court requires. *Sturgeon*, 136 S. Ct. at 1070; *Roberts*, 566 U.S. at 101. And it overlooked a critical aspect of § 630(b)'s text that cuts directly against the court's novel construction of the statute.

2. The Ninth Circuit was equally inattentive to a second feature of § 630(b): The court did not meaningfully consider whether the term "person" in the statute's first sentence encompasses political subdivisions of a State. Yet that issue—like the meaning of the "agent" clause—bears on the question presented. If "person" includes political subdivisions, then § 630(b)'s first sentence defines all political subdivisions with at least twenty employees as employers. It would then be strangely redundant for § 630(b)'s second sentence to separately define *all* political subdivisions as employers—the Ninth Circuit's construction here. But it would be entirely consistent for § 630(b)'s second sentence merely to *clarify* that political subdivisions, unlike certain other governmental entities, are no longer categorically exempt from statutory coverage—the construction endorsed by the Sixth, Seventh, Eighth, and Tenth Circuits. *Cink*, 635 F. App'x at 474 n.5; *Palmer*, 154 F.3d at 896-97; *Monclova*, 920 F.2d at 362; *Kelly*, 801 F.2d at 270-71. That reading would also be consistent with the "agent" clause, which the courts of appeals uniformly understand to clarify the scope of § 630(b)'s first sentence.

The Ninth Circuit summarily dismissed this reading of "person." It concluded in a footnote, without explanation or citation, that "political subdivisions are not defined as persons in § 630(a)." Pet. App. 7a n.3. Again, however, the court failed to explain why that was the only viable reading of the statute. This Court has repeatedly construed the term "person" in federal statutes to include local governments. *See Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 122 (2003) (False Claims Act); *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978) (42 U.S.C. § 1983). And a more probing examination of § 630(a) shows that, contrary to the Ninth Circuit's assumption, "person" should likewise be read to encompass State political subdivisions under the ADEA.

Section 630(a) defines a "person" as "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." 29 U.S.C. § 630(a). The catch-all phrase "any organized groups of persons" is particularly sweeping—and circular, using the very term ("person") that it seeks to define. This language is most naturally read to include special districts like Mount Lemmon, which are often organized and staffed by local property owners. And it certainly does not *exclude* such entities with any clarity. At a minimum, the breadth and circularity of the language create an ambiguity as to whether the statute's definition of "person" encompasses State political subdivisions.

Any such ambiguity, in turn, must be resolved in favor of including political subdivisions in the definition of "person." The ADEA's original text is particularly instructive. When the statute was first enacted, § 630(a) contained the current definition of "person." Pub. L. No. 90-202, § 11(a), 81 Stat. 605. As noted, § 630(b) then defined "employer" by narrowing the term "person" in several ways. *Id.* § 11(b). Most importantly, it expressly *excluded* "the United States, a corporation wholly owned by the Government of the United States, or a State *or political subdivision thereof*." *Id.* (emphasis added). The exclusion of political subdivisions would have been mere surplusage if the term "person" already omitted local governments—a result this Court rejects where feasible. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). But the exclusion of political subdivisions would make perfect sense if "person," standing alone, includes those entities. The statute must be so construed. *Cf. Hutchins v. U.S. Dep't of Labor*, 683 F.3d 75, 77 (4th Cir. 2012) (provision of 5 U.S.C. § 8132 stating that "the liable party must be a 'person' besides the United States" established that "political entities," including local governments, "can be 'persons'").

3. The Ninth Circuit's failure to interpret § 630(b) holistically, as this Court requires, is perhaps most apparent in its flawed analogies to hypothetical texts. As noted, the court likened the ADEA to two invented provisions. First, it "imagine[d] someone saying: 'The password can be an even number. The password can also be an odd number greater than one hundred.'" Pet. App. 7a-8a. The court reasoned that in such a text, the phrase "greater than one hundred"—which

clearly applies to the phrase "odd number"—could not also apply to the phrase "even number." Pet. App. 8a.

Second, the Ninth Circuit invented a statute that read: "The word bank means 'the rising ground bordering a lake, river, or sea' and the word also means 'a place where something is held available....'" *Id.* The court then explained that the phrase "bordering a lake, river, or sea"—which clearly applies to the phrase "rising ground"—could not also apply to the phrase "a place where something is held available." *Id.* In the court's view, it was particularly "obvious" that such a construction would be improper because the resulting alternate definition of bank—"a place where something is held available" "bordering a lake, river, or sea"—would be "illogical." *Id.*

Both of those invented provisions, like § 630(b), contain two sentences. But the similarities end there. Neither hypothetical includes language comparable to the "agent" clause. And neither uses a pair of definitional phrases—like "person" and "political subdivisions"—that are best read as overlapping rather than mutually exclusive. The invented provisions thus omit the very textual and structural features of § 630(b) that call into question the Ninth Circuit's broad construction. Moreover, the "bank" statute becomes "illogical" when read narrowly. Section 630(b), in contrast, remains entirely coherent when read to subject private businesses and State political subdivisions to the same twenty-employee threshold for ADEA liability. By relying on these inapposite analogies, the Ninth Circuit doubled down on its failure to read the ADEA's words "in their context and with a

view to their place in the overall statutory scheme." *Sturgeon*, 136 S. Ct. at 1070.

At bottom, the only common ground among § 630(b) and the Ninth Circuit's invented provisions is that in each case, the word "also" appears near the beginning of the second sentence. The court may have considered that word alone to be dispositive. Quoting Webster's New Collegiate Dictionary, it noted that "also" generally means "in addition; besides" and "likewise; too." Pet. App. 7a. On that basis, the court concluded that § 630(b)'s second sentence must "add[] another definition to a previous definition of a term," rather than "clarify[ing] the previous definition." *Id.*

But the dictionary definition of a single word linking statutory phrases does not possess such talismanic significance. Rather, all statutory language—including connecting terms like "also"—must be construed within the context of the broader statutory scheme. This Court took precisely that approach in *McNally v. United States*, 483 U.S. 350 (1987). There, a prior version of 18 U.S.C. § 1341 proscribed conduct using two distinct phrases linked by the word "or": "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130 (emphasis added). The issue before the Court paralleled the question presented here: whether "the money-or-property requirement of the latter phrase" also applies to the "scheme or artifice to defraud" mentioned in the first phrase. *McNally*, 483 U.S. at 357-58.

The dictionary defines "or" as a disjunctive term generally used to "indicate an alternative." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/or. And this Court recognized that "[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently and that the money-or-property requirement of the latter phrase does not limit schemes to defraud to those aimed at causing deprivation of money or property." *McNally*, 482 U.S. at 358. After considering how the language at issue fit into the broader statutory scheme, however, the Court reached a different conclusion: The money-or-property requirement applied to both phrases, and the second phrase merely *clarified* the first by making it "unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *Id.* at 359.

Section 630(b) should be construed in the same holistic fashion. And, as in *McNally*, a dictionary definition of "also" cannot nullify compelling textual and structural evidence that the reference to "political subdivisions" in § 630(b)'s second sentence merely clarifies the scope of the preceding definition of "employer."

4. When § 630(b) is read holistically, therefore, the narrower interpretation endorsed by the Sixth, Seventh, Eighth, and Tenth Circuits is not only reasonable—it is the best reading of the statute. And that conclusion becomes even clearer after considering § 630(b)'s implications for the balance between federal and State powers. This Court has long held that

"'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (quoting *Gregory*, 501 U.S. at 460). Accordingly, before construing a provision to "affect[] the federal balance," a court must identify a particularly "clear statement" to that effect in the statute's text. *Id.* (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). This "background principle" of statutory interpretation ensures "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* (quoting *Bass*, 404 U.S. at 349).

The Ninth Circuit's flawed construction of § 630(b) would have a substantial effect on the federal balance. Despite their limited personnel and budgets, the country's smallest political subdivisions—including fire districts like Mount Lemmon—provide critical services to a wide swath of local communities. For decades, States have determined how best to regulate the employment practices of these subdivisions in light of their staffing constraints and the vital functions they perform. The Ninth Circuit's broad reading of the ADEA would improperly displace those State judgments without the required clear statement from Congress.[7]

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[7] The Ninth Circuit actually *inverted* the clear statement rule. It emphasized that "Congress could have" unmistakably exempted small State political subdivisions by expressly adding the twenty-employee minimum "to each definition discussed in

B. The purposes and history of the ADEA, both standing alone and in relation to Title VII, confirm that State political subdivisions are "employers" only if they have twenty or more employees.

1. The majority construction of § 630(b) is further buttressed by analysis of the ADEA's purposes and history. To begin with, substantial evidence indicates that the amended statute was designed to subject private, local governmental, and State employers to the same prohibitions. *See* 120 Cong. Rec. 8768 (Mar. 28, 1974) (statement of Sen. Bentsen) ("passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment based on age as are employees in the private sector"); Special S. Committee on Aging, 93d Cong., Improving the Age Discrimination Law 17 (Comm. Print 1973) ("[I]t is difficult to see why one set of rules should apply to private industry and varying standards to government."); 118 Cong. Rec. 15894-95 (May 4, 1972) (statement of Sen. Bentsen) ("employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy").

By contrast, no congressional report "drew any distinction between the coverage of public and private employers." *Kelly*, 801 F.2d at 272. That would be a

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§ 630(b), or at least to the definition covering political subdivisions, but it chose not to." Pet. App. 10a. The court mistakenly concluded that Congress's failure to *exclude* small political subdivisions in such clear terms confirmed that § 630(b) could *only* be read more expansively. *Id; see supra* at 17.

puzzling omission if Congress intended radically broader coverage of governmental entities. Moreover, the Ninth Circuit itself has recognized that the ADEA "limits liability to employers with twenty or more employees ... in part because Congress did not want to burden small entities with the costs associated with litigating discrimination claims." *Miller*, 991 F.2d at 587. That rationale applies with full force to modestly funded special districts like Mount Lemmon.

Relatedly, the ADEA was designed to mirror Title VII. As this Court has emphasized, the two statutes, although not identical, have "important similarities" and work in tandem to prohibit workplace discrimination. *Lorillard*, 434 U.S. at 584. As originally enacted in 1964, Title VII covered private entities with at least twenty-five employees; three years later, the ADEA was signed into law with an identical scope. Title VII was then amended in 1972 to cover private, local governmental, and State employers that meet a uniform fifteen-employee minimum. Two years later, Congress sought to expand the ADEA's scope in the same way. *See* 118 Cong. Rec. 15895 (statement of Sen. Bentsen) ("the principles underlying [the 1972 Title VII amendment] are directly applicable to the Age Discrimination in Employment Act"). The narrower reading of § 630(b) comports with that statutory purpose, providing that the ADEA—like Title VII—subjects private and public employers to a uniform employee minimum. The statutes thus remain symmetrical and complementary "both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions." *Lorillard*, 434 U.S. at 584.

The Ninth Circuit's aberrant construction, in contrast, would create an incoherent federal antidiscrimination regime. When it comes to private employers, Title VII would sweep more broadly than the ADEA, suggesting that "the problems addressed by Title VII"—including discrimination based on race, sex, and national origin—are "more serious than the problem of age discrimination." *Kelly*, 801 F.2d at 271 (citing *Wyoming*, 460 U.S. at 231). For State political subdivisions, however, just the opposite would be true: The ADEA would sweep far more broadly than Title VII, suggesting an inversion of antidiscrimination priorities. As the Seventh Circuit noted, there is "no support whatsoever" for such an inexplicable disparity in the broader framework of federal law. *Id.* at 273.

2. The Ninth Circuit erroneously disregarded that evidence of the ADEA's purposes and history. Pet. App. 15a-16a. Instead, it held that certain textual differences between the ADEA and Title VII show that Congress intended to establish the uneven federal antidiscrimination regime just described, in which the ADEA's scope is narrower than Title VII's in the private sector but far broader in the public sphere. Pet. App. 15a. Nothing in either statutory scheme supports that illogical outcome.

As originally enacted, both Title VII and the ADEA defined an "employer" as a certain type of "person." And both statutes expressly excluded political subdivisions from coverage. *See* Pub. L. No. 88-352, § 701(b), 78 Stat. 253; Pub. L. No. 90-202, § 11(b), 81 Stat. 605. But the statutes differed in several respects. Most significantly, Title VII defined "person"

in narrower terms—as "one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers." Pub. L. No. 88-352, § 701(b), 78 Stat. 253. The ADEA's more sweeping definition of "person," in contrast, extended to "any organized groups of persons"—a phrase far more expansive than any language in Title VII's definition. Pub. L. No. 90-202, § 11(a), 81 Stat. 605.

When Congress amended Title VII to cover certain public employers, it expressly added "governments, governmental agencies, [and] political subdivisions" to the statute's relatively narrow definition of "person." Pub. L. No. 92-261, § 2(1), 86 Stat. 103. The amendment also eliminated the separate clause that expressly excluded political subdivisions from coverage. *Id.* § 2(2). Those changes extended statutory coverage to political subdivisions with at least fifteen employees. *See* 42 U.S.C. § 2000e.

Two years later, Congress took a different approach when amending the ADEA's distinct statutory text. It left the broader definition of "person," including the circular phrase "any organized groups of persons," in place. *See* Pub. L. No. 93-259, § 28, 88 Stat. 74. And it eliminated the categorical prohibition of State political subdivisions from coverage. *Id.* As explained, those changes extended statutory coverage to political subdivisions with at least twenty employees, mirroring the effect of the recent amendment to Title VII.

The Ninth Circuit mistakenly concluded that those post-amendment differences between the two statutes mean that the ADEA's minimum employee threshold cannot extend to State political subdivisions. In the court's view, "[i]f Congress had wanted the 1974 ADEA Amendment to achieve the same result as the 1972 Title VII Amendment, it could have used the same language." Pet. App. 15a. But there is no such interpretive rule. When Congress amends statutes that are differently worded to begin with, it need not harmonize their language in order to achieve similar legislative ends. To hold otherwise would require an unprecedented and impracticable congressional effort to standardize language across the entire United States Code. Here, Congress may simply have decided that Title VII's relatively narrow definition of "person" required additional words to clarify the inclusion of political subdivisions, whereas the ADEA's broader definition needed no such clarification. The Ninth Circuit's effort to draw anything more conclusive from the inter-statute comparison is without basis. And, as noted, it consciously deviates from the analysis of all other courts of appeals that have addressed the question.

IV. This Case Is An Ideal Vehicle For Answering The Question Presented And Resolving The Circuit Split.

Finally, this case presents an ideal vehicle to decide the question presented. The Ninth Circuit received extensive submissions on the scope of the ADEA's coverage of State political subdivisions. The parties addressed the issue in two distinct rounds of

briefing, the second devoted entirely to the Tenth Circuit's intervening decision in *Cink*. *See* No. 15-15030, ECF Nos. 34-37. And the Equal Employment Opportunity Commission filed a brief as amicus curiae. *Id.* ECF No. 12. The question presented thus received comprehensive attention in the proceedings below.

Further, the Ninth Circuit's resolution of the question presented was the sole basis for its decision. The court reversed the district court's grant of summary judgment for Mount Lemmon solely because it held that the ADEA's 20-employee minimum was inapplicable to State political subdivisions. Pet. App. 17a. And in doing so, the Ninth Circuit expressly acknowledged its deliberate departure from the holdings of the Sixth, Seventh, Eighth, and Tenth Circuits. This case is thus a particularly clean vehicle for this Court's review.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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October 18, 2017

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN GUIDO; DENNIS RANKIN, *Plaintiffs–Appellants,* v. MOUNT LEMMON FIRE DISTRICT, *Defendant–Appellee.*	No. 15-15030 D.C. No. 4:13-cv-00216-JAS OPINION

Appeal from the United States District Court
for the District of Arizona
James Alan Soto, District Judge, Presiding

Argued and Submitted December 15, 2016
San Francisco, California

Filed June 19, 2017

Before: Diarmuid F. O'Scannlain, Ronald M. Gould, and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge O'Scannlain

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Opinion by Judge O'Scannlain

SUMMARY*

Employment Discrimination

The panel reversed the district court's summary judgment in favor of the defendant fire district, a political subdivision of Arizona, in an action brought by two firefighter captains under the Age Discrimination in Employment Act.

Disagreeing with other circuits, the panel held that a political subdivision of a State need not have twenty or more employees in order to qualify as an employer subject to the requirements of the ADEA. The panel remanded the case for further proceedings.

COUNSEL

Shannon Giles (argued) and Don Awerkamp, Awerkamp & Bonilla P.L.C., Tucson, Arizona, for Plaintiffs-Appellants.

Jeffrey C. Matura (argued) and Amanda J. Taylor, Graif Barrett & Matura P.C., Phoenix, Arizona, for Defendant-Appellee.

Anne Noel Occhialino (argued), Attorney; Jennifer S. Goldstein, Associate General Counsel; P. David Lopez, General Counsel; Office of General Counsel,

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Equal Employment Opportunity Commission, Washington, D.C.; for Amicus Curiae Equal Employment Opportunity Commission.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the Age Discrimination in Employment Act of 1967 applies to a political subdivision of Arizona.

I

John Guido and Dennis Rankin were both hired in 2000 by Mount Lemmon Fire District, a political subdivision of the State of Arizona. Guido and Rankin served as full-time firefighter Captains. They were the two oldest full-time employees at the Fire District when they were terminated on June 15, 2009, Guido at forty-six years of age and Rankin at fifty-four.

Guido and Rankin subsequently filed charges of age discrimination against the Fire District with the Equal Employment Opportunity Commission ("EEOC"), which issued separate favorable rulings for each, finding reasonable cause to believe the Fire District violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 ("ADEA"). They then filed this suit for age discrimination against the Fire District in April 2013.

The district court granted the Fire District's motion for summary judgment, concluding that it was not an "employer" within the meaning of the ADEA.

Guido and Rankin timely appealed.

II

Guido and Rankin challenge the district court's conclusion that the Fire District was not an "employer" within the meaning of the ADEA.

A

The ADEA applies only to an "employer." Under 29 U.S.C. § 630(b):

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year ... The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

Under § 630(a):

> The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

The parties agree that the twenty-employee minimum applies to "a person engaged in an industry affecting commerce" and that the term "person" does not include a political subdivision of a State. However, they dispute whether the twenty-employee minimum also applies to a "political subdivision of a State." § 630(b).

B

Congress passed the ADEA to protect older workers from "arbitrary age discrimination in employment."[1] 29 U.S.C. § 621(b). The statute originally applied only to private-sector employers. *See* Special Committee on Aging, U.S. Senate, *Improving the Age Discrimination Law* 11 (1973) (the "Senate Age Discrimination Report"). Congress amended the ADEA in 1974 to extend coverage to States, political subdivisions of States, and other

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[1] We "begin [our analysis] with the plain language of the statute." *Negusie v. Holder*, 555 U.S. 511, 542 (2009). If the "statutory text is plain and unambiguous[,]" we "must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). "Only when statutes are ambiguous may courts look to legislative history." *In re Del Biaggio*, 834 F.3d 1003, 1010 (9th Cir. 2016) (citing *Nakano v. United States*, 742 F.3d 1208, 1214 (9th Cir. 2014)).

State-related entities by adding a second sentence to § 630(b). Pub. L. No. 93-259, § 28, 88 Stat. 55 (1974) (the "1974 ADEA Amendment").[2]

1

Guido and Rankin contend that § 630(b) is not ambiguous and applies to the Fire District. They assert that its plain meaning creates distinct categories of "employers" and that the Fire District fits within one of them. *See Young v. Sedgwick County*, 660 F. Supp. 918, 924 (D. Kan. 1987); *see also EEOC v. Wyoming*, 460 U.S. 226, 233 (1983) ("In 1974, Congress extended the substantive prohibitions of the [ADEA] to employers having at least 20 workers, *and* to the Federal and State Governments." (emphasis added)). Section 630(b), they argue, is deconstructed as follows: The term "employer" means [A—person] and also means (1) [B—agent of person] and (2) [C—State-affiliated entities].

They note that each of the three "employer" categories is then further defined. For example, the "person" category is elaborated upon in § 630(a), which provides multiple definitions of the term "person" and then narrows the category to those persons "engaged in an industry affecting commerce who has twenty or more employees for each working

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[2] The 1974 ADEA Amendment also lowered the employee minimum from twenty-five to twenty.

day."[3] The "State-affiliated entities" category lists the various types of State-affiliated entities covered, such as a "political subdivision of a State," and also contains clarifying language.

a

They argue that the ordinary meaning of "also" supports the notion that there are three distinct categories. *See Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009). We agree. The word "also" is a term of enhancement; it means "in addition; besides" and "likewise; too." *E.g.*, Webster's New Collegiate Dictionary 34 (1973). As used in this context, "also" adds another definition to a previous definition of a term—it does not clarify the previous definition. *See Holloway v. Water Works & Sewer Bd. of Town of Vernon*, 24 F. Supp. 3d 1112, 1117 (N.D. Ala. 2014) (concluding the twenty-employee limitation should not be imported into the definition of employer covering political subdivisions of a state); *see also Johnson v. Mayor & City Council of Baltimore*, 472 U.S. 353, 356 (1985) ("[I]n 1974 Congress extended coverage to Federal, State, and local Governments, *and* to employers with at least 20 workers." (emphasis added)).

For example, imagine someone saying: "The password can be an even number. The password can

---

[3] Agents of persons and political subdivisions are not defined as persons in § 630(a), thus explaining why they have to be included as separate definitions of employers in § 630(b).

also be an odd number greater than one hundred."[4] These are two separate definitions of what an acceptable password can be, and the clarifying language does not apply to both definitions. If the sentences are reversed,[5] the "greater than one hundred" limiting language would still not carry over to the second sentence discussing even numbers. *See Holloway*, 24 F. Supp. 3d at 1117. This becomes more obvious when it would be illogical to carry clarifying language over. If a statute said "The word bank means 'the rising ground bordering a lake, river, or sea' and the word also means 'a place where something is held available,'" the second definition would not be describing a place that must border a lake, river, or sea. Merriam-Webster, https://www.merriam-webster.com/dictionary/bank. The phrase "also means" indicates that a second, *additional* definition is being described. *See* § 630(b) (using the phrase "also means").

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[4] If someone said "a password can be any even number," the ordinary meaning of this sentence would be that an odd number cannot be a password. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (concluding that a statute that states a bankruptcy trustee has the right to recover but is silent regarding an administrative claimant should be read as not giving such claimant the same right); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (discussing the *expressio unius est exclusio alterius* canon) (2012).

[5] I.e., "The password can be an odd number greater than one hundred. It can also be an even number."

The EEOC, as amicus curiae, expressing its views in support of Guido and Rankin, contends that the English language provided Congress many ways to apply clarifying language across multiple definitions of a term, had it wanted to. The EEOC cites the 1972 amendment to Title VII of the Civil Rights Act of 1964 as an example (the "1972 Title VII Amendment"). This amendment extended Title VII protections to States and State-related entities, including political subdivisions of a State. Pub. L. 92-261, § 2, 86 Stat. 103 (codified as 42 U.S.C. § 2000e). The EEOC emphasizes that the 1972 Title VII Amendment used language making clear that the twenty-employee minimum applied to political subdivisions, stating:

> (a) The term "person" includes one or more individuals, *governments, governmental agencies, political subdivisions*, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees...

42 U.S.C. § 2000e (emphasis added). The EEOC argues that Congress knew how to use language to ensure that an employee minimum applied to political subdivisions when it wanted.[6] Congress could have also added the limiting language to each definition discussed in § 630(b), or at least to the definition covering political subdivisions, but it chose not to.[7]

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[6] Congress could have made the second sentence of § 630(b) the second sentence of § 630(a), not changed a word, and the twenty-employee minimum would clearly apply to political subdivisions. It would then have read as follows:

> (a) The term "person" means one or more individuals, partnerships, associations, labor organization, corporations, business trusts, legal representatives, or any organized group of persons. *The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.*
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year...

[7] Section 630(a)-(b) does such for private sector employers, defining "pereon" broadly—including labor organizations, partnerships, and business trusts—then defining the term employer to mean a person with at least twenty employees. That

In the face of such a strong textual argument, the Fire District has a powerful rebuttal: four other circuits have considered this issue and all have declared § 630(b) to be ambiguous. *Cink v. Grant County*, 635 F. App'x 470, 474 n.5 (10th Cir. 2015); *Palmer v. Ark. Council on Econ. Educ.*, 154 F.3d 892, 896 (8th Cir. 1998); *E.E.O.C. v. Monclova Twp.*, 920 F.2d 360, 363 (6th Cir. 1990); *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270 (7th Cir. 1986).[8] *Cink*, *Palmer*, and *Monclova Township* all rely entirely on *Kelly's* reasoning regarding the statute's ambiguity.[9]

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structure ensures that the twenty-employee minimum limitation applies to all definitions of the term "person." § 630(b).

[8] Further, every circuit to consider the question of whether the twenty-employee minimum applies to the "agent" category has concluded that § 630(b) is ambiguous. *See Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (concluding Congress just intended "to incorporate respondeat superior liability into the statute"); *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994).

[9] *Cink* analyzes the entire interpretation question in two sentences, adopting the reasoning of *Kelly* and the other circuits. 635 F. App'x at 474 n.5. *Palmer* concludes § 630(b) is ambiguous with one sentence of analysis, adopting the reasoning of *Schaefer v. Transportation Media, Inc.*, which itself had adopted the reasoning of *Kelly*. 859 F.2d 1251, 1254 (7th Cir. 1988) (citing *Kelly*, 801 F.2d 269). *Monclova Township* also adopts *Kelly's* reasoning about the provision being ambiguous without adding anything to the analysis. 920 F.2d at 362-63.

The Seventh Circuit in *Kelly* concluded the statute was ambiguous. While acknowledging that the categorical reading was a reasonable one, it concluded the plaintiff "weaken[ed] his argument that the statute is unambiguous by arguing that we should look at 'common sense' and congressional intent in deciding that the statute is unambiguous." 801 F.2d at 270. It is not clear to us why an appeal to "common sense" undermines this argument. Further, any appeal to congressional intent is a non-sequitur; it is not a factor that should affect the determination of whether a statute's plain meaning is ambiguous. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 391 (2012).

The *Kelly* opinion further supports its conclusion by stating that the defendant presented a reasonable alternative construction:

> More significantly, the Park District enunciates another fair and reasonable interpretation of section 630(b)—that Congress, in amending section 630(b), merely intended to make it clear that states and their political subdivisions are to be *included* in the definition of 'employer,' as opposed to being a separate definition of employer.

Id. at 270-71. Since the alternative reading was also deemed reasonable, the court concluded the statute was ambiguous. *Id.* at 270.

A serious problem with the alternative interpretation argument, however; is that the court in

Kelly never explained how it is a "fair and reasonable interpretation" of the statute's actual language. A statute must be "susceptible to more than one reasonable interpretation" to be ambiguous. *Alaska Wilderness League v. E.P.A.*, 727 F.3d 934, 938 (9th Cir. 2013). But, declaring that multiple reasonable interpretations exist does not make it so. None of the cases cited by the Fire District elaborate on how and why this alternative interpretation is a reasonable one—they simply declare it so.

As a matter of plain meaning, the argument that § 630(b) can be reasonably interpreted to include its second sentence definitions within its first is underwhelming. If Congress had wanted to include the second sentence definitions of employer in the first sentence, it could have used the word "include" or utilized one of the other alternative constructions described above. The word "also" is not used in common speech to mean "includes." Webster's New Collegiate Dictionary 34 (1973). As previously described, the use of separate sentences and the word "also" combine to create distinct categories, in which clarifying language for one category does not apply to other categories. *See United States v. Rentz*, 777 F.3d 1105, 1109 (10th Cir. 2015) ("[U]ntil a clue emerges suggesting otherwise, it's not unreasonable to think that Congress used the English language according to its conventions."). Even the Supreme Court defaults into the categorical approach when discussing the statute. *E.g.*, *Wyoming*, 460 U.S. at 233; *Johnson*, 472 U.S. at 356.

We are persuaded that the meaning of § 630(b) is not ambiguous. The twenty-employee minimum does not apply to definitions in the second sentence and there is no reason to depart from the statute's plain meaning. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."). We are satisfied that our reading comports with *Lamie* and certainly does not threaten to destroy the entire statutory scheme. *See King v. Burwell*, 135 S. Ct. 2480, 2495 (2015) (preventing the destruction of the statutory scheme may justify departing from "the most natural reading of the pertinent statutory phrase"). Courts should rarely depart from a statute's clear meaning because it risks creating a perception that they are inserting their own policy preferences into a law. *See id.* at 2495-96 (citing *Palmer v. Massachusetts*, 308 U.S. 79, 83 (1939)). Here, there is no valid justification to depart from the plain meaning of the language and to adopt another interpretation.

C

Even if we agreed with the Fire District and concluded that the statute is ambiguous—which we do not—the outcome would not change. The best reading of the statute would be that the twenty-employee minimum does not apply to a political subdivision of a State. We reject the Fire District's contention that considering the legislative history

Kelly reviewed should lead us to an alternative interpretation.

After concluding that the statute is ambiguous, *Kelly* relied on "the parallel [1972] amendment of Title VII" and the legislative history around the 1974 Amendment to conclude "that Congress intended section 630(h) to apply the same coverage to both public and private employees." 801 F.2d at 271-72. *Kelly's* focus on divining congressional intent, rather than determining the ordinary meaning of the text, led it astray. *See Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 102 (2008) ("We have to read [the ADEA] the way Congress wrote it."); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 391 (critiquing those who think "that the purpose of interpretation is to discover intent"). We need not read minds to read text.

Both parties argue that the 1972 Title VII Amendment supports their position. But, critically, Congress used different language than it used in the 1974 ADEA Amendment, which changes the ADEA's meaning relative to Title VII, and such Congressional choice must be respected. *See Univ. of Tex. SW Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528-29 (2013). If Congress had wanted the 1974 ADEA Amendment to achieve the same result as the 1972 Title VII Amendment, it could have used the same language.

Nor does the legislative history *Kelly* relies on address the specific question before us. *Kelly*, 801 F.2d at 271-72. It references a Senate report written a year before the bill was passed discussing how the same set of rules should apply to the private sector

and the government. *Id.* (citing Senate Age Discrimination Report at 17). The Senate report never states that the twenty-employee minimum should apply to political subdivisions, but it does "urge that the law be extended ... to include (1) Federal, State, and local governmental employees, *and* (2) employers with 20 or more employees." Senate Age Discrimination Report at 18 (emphasis added). It also cites a House report containing the same vague language about ensuring the same rules apply and two floor statements by Senator Bentsen, one of which occurred in 1972, arguing that the amendment is needed so that government employees receive the "same protection." *Id.* (citing H.R. Rep. No. 93-913 (1974); 118 Cong. Rec. 15,895 (1972); 120 Cong. Rec. 8768 (1974)).

Eventually, the *Kelly* court resorted to arguing that given its perception of Congressional intent, Congress could not have intended what it said. 801 F.2d at 273 ("We also believe that applying the ADEA to government employers with less than twenty employees would lead to some anomalous results which we do not believe Congress would have intended."). However, there are plenty of perfectly valid reasons why Congress could have structured the statute the way it did.[10] In any event, it is not our role to choose what we think is the best policy outcome and to override the plain meaning of a statute, apparent

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[10] One can imagine policy reasons for all these choices. Perhaps Congress thinks that government agencies, even very small ones like the Fire District, can better bear the costs of lawsuits than small private-sector businesses or that government should be a model of non-discrimination.

anomalies or not. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014).

III

The district court erred in concluding that the twenty-employee minimum applies to political subdivisions; it does not. Therefore, the order granting summary judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

John Guido, et al., Plaintiffs, v. Mount Lemmon Fire District, Defendant.	No. CV-13-00216-TUC-JAS **ORDER**

Pending before the Court is Defendant's motion for summary judgment and Plaintiffs' cross-motion for partial summary judgment.[1] For the reasons stated below, Defendant's motion for summary judgment is granted and Plaintiffs' cross-motion for partial summary judgment is denied.

STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit

[1] As the Court would not find oral argument helpful in resolving this matter, oral argument is denied.

under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).[2] A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Id.* An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Id.* Thus, the "mere scintilla of evidence" in support of the nonmoving party's claim is insufficient to defeat summary judgment. *Id.* at 252. However, in evaluating a motion for summary judgment, "the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

BACKGROUND

Plaintiffs John Guido and Dennis Rankin began working for Defendant Mount Lemmon Fire District in 2000. The position each held was Firefighter EMT. In 2005, both Guido and Rankin were promoted to the rank of Captain. On June 15, 2009, Guido and Rankin were laid off; Rankin was in his fifties and Guido was in his forties at the time of the layoffs. On July 28, 2009, Guido and Rankin each filed a Charge of Discrimination with the U.S. Equal Employment Opportunity Commission alleging that Defendant discriminated against them on the basis of age. Thereafter, on April 1, 2013, Plaintiffs filed a Complaint in this case alleging that they were terminated in violation of the Age Discrimination in

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[2] When citing and quoting cases throughout this Order, internal quotes and citations have been omitted unless otherwise noted by the Court.

Employment Act ("ADEA") which prohibits discrimination against employees 40 and older on the basis of their age.[3]

DISCUSSION

Political Subdivisions and the 20 Employee Requirement

Defendant argues that this case is subject to dismissal as the ADEA only applies to employers that have 20 or more employees, and the undisputed facts

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[3] The Court has omitted a detailed discussion of the parties' factual positions pertaining to the underlying merits of the case as this case is subject to dismissal on other grounds (i.e., the ADEA does not apply as Defendant did not have 20 or more employees during the relevant time period as required by the ADEA). In a nutshell, Plaintiffs argue they were very experienced, qualified, and received positive performance evaluations; they were over 40 when they were laid off and were the oldest full-time employees at the time; they were replaced by substantially younger and less qualified individuals; and Defendant's reasons for their layoffs are pretext. In contrast, Defendant argues that it had been facing a budget crisis for several years; it was forced to lay off employees due to lack of funding; that Plaintiffs were eventually laid off as they were asked (like all other firefighters) to help increase funding by participating in wild land fire assignments which brought in extra money for Defendant (but Plaintiffs failed to participate in such assignments unlike other firefighters who did participate to bring in extra funding); and there is otherwise no evidence of age discrimination as Defendant hired Rankin when he was 46 years old, promoted Guido and Rankin to Captains in 2005 (when Guido was 42 years old and Rankin was 50 years old), they were laid off only four years after they had been promoted, and the same person that hired and promoted them also laid them off.

show that Defendant never had 20 or more employees during the relevant time period in this case. In contrast, Plaintiffs argue that Defendant's argument must fail as the 20 employee requirement does not apply to political subdivisions such as Defendant. A review of the pertinent authority reflects that the 20 employee requirement applies to political subdivisions.

The ADEA defines an employer subject to the provisions of the ADEA as: "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States." 29 U.S.C. 630(b) (emphasis in the original).

Plaintiff argues that the clear language of the statute reflects that if an entity is a political subdivision, it automatically qualifies as an "employer" under the statute, and the 20 employee requirement is not imported into the provision pertaining to political subdivisions. Although the Ninth Circuit has not addressed this issue, Defendant correctly argues that the Circuit Courts that have directly addressed this issue have consistently

rejected the position advanced by Plaintiff, and have found that the 20 employee requirement does apply to political subdivisions. The Seventh Circuit was the first Circuit Court to address this issue. See *Kelly v. Wauconda Park District*, 801 F.2d 269 (7th Cir. 1986). The plaintiff in *Kelly* presented the same argument as Plaintiff in this case: that the clear language of the statute reflects that the 20 employee requirement does not apply to political subdivisions. The defendant in *Kelly* argued that in amending and expanding the statute from applying to just private employers to also government employers, Congress applied the 20 employee requirement to government employers as well. The Seventh Circuit resolved the issue as follows:

> The first issue we must decide is whether the definition of employer in section 630 is ambiguous. If the plain language of the statute is clear, we do not look beyond those words to interpret the statute ... When the statute's language is ambiguous, we look to the legislative history of the statute to guide our interpretation ... Kelly argues that, by setting state and political subdivisions in a separate sentence, Congress unambiguously indicated that government employers were a separate category of employers not subject to the twenty-employee minimum. Although Kelly's reading of the statute is certainly a fair and reasonable one, we disagree that the language is capable of

only that interpretation ... [Defendant] enunciates another fair and reasonable interpretation of section 630(b)—that Congress, in amending section 630(b), merely intended to make it clear that states and their political subdivisions are to be included in the definition of "employer," as opposed to being a separate definition of employer. Under this interpretation, government employers would be subject to the same limits as other employers. Because both Kelly and [defendant] present reasonable, but conflicting, interpretations of the plain meaning of section 630(b), we cannot say that the statute is unambiguous. We therefore must look to the legislative history to guide our interpretation ... [T]he legislative history of ... the ADEA ... indicate[s] that Congress's main purpose in amending the [ADEA] was to put public and private employers on the same footing. The Senate Special Committee on Aging supported extending the ADEA because "it is difficult to see why one set of rules should apply to private industry and varying standards to government" ... Both the Senate Special Committee on Aging Report and the House Report supporting the ADEA amendment, ... recommended adding public employers to the ADEA

as well as lowering the minimum number of employees from twenty-five to twenty. Neither report drew any distinction between the coverage of public and private employers ... Following the 1974 ADEA amendment, Senator Bentsen stated that "[t]he passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment [discrimination] based on age as are employees in the private sector ... [T]he final enactment of the ADEA amendment in 1974 completed coverage of public employees on the same basis as private employees ... In the face of this evidence that Congress intended section 630(b) to apply the same coverage to both public and private employees, Kelly fails to offer any evidence from the legislative record of the 1974 ADEA amendment which supports his interpretation of section 630(b) ... [T]he relevant legislative history discussed above firmly indicates that Congress intended the ADEA ... [to subject] public and private employers to the same employment discrimination coverage ... Congress intended the ADEA amendment to cover public and private employers equally ... [T]he legislative history of the statute, which

> we find supports the [defendant's] reading of the statute, i.e., that the twenty-employee minimum applies to government employers. Because [defendant] has never employed twenty employees, the district court's decision to dismiss Kelly's complaint is affirmed.

Id. at 270-73. Other Circuits that have addressed the issue have agreed with Kelly that the statute is ambiguous, that the legislative history reflects that Congress intended the 20 employee requirement to apply to government employers, and that the 20 employee requirement applies to political subdivisions. *See Palmer v. Arkansas Council on Economic Education*, 154 F.3d 892, 896 (8th Cir. 1998); *E.E.O.C. v. Monclova Township*, 920 F.2d 360, 363 (6th Cir. 1990). The Court finds this Circuit authority persuasive, and likewise finds that the 20 employee requirement applies to political subdivisions such as Defendant.[4] As such, unless

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[4] The Court notes that the only case Plaintiffs cite to support their position is from the Northern District of Alabama. *See Holloway v. Water Works and Sewer Board Of the Town of Vernon*, 2014 WL 2566066, *5 (N.D.Ala. May 15, 2014). While this case does support Plaintiff's position, it is contrary to the consistent line of Circuit Court cases that have addressed the issue, and the Court finds these decisions more persuasive. In addition, the Court notes that the *Holloway* case does not explain why the analysis in the Circuit Court cases is inapplicable; *Holloway* summarily states that the statute is clear that the 20 employee requirement is inapplicable to political subdivisions, and therefore there was no need to address the

there is an issue of fact as to whether Defendant fell within the 20 employee requirement during the pertinent timeframe (i.e., 2008 and 2009), Plaintiffs' case must be dismissed.

Qualifying Employees for 2008 and 2009

At most, Defendant argues that the undisputed facts show that Defendant had no more than 19 qualifying employees in both 2008 and 2009. Defendant submits records from the Arizona Department of Economic Security reflecting that in 2008 and 2009, Defendant only paid a total of 19 individuals for performing full and part-time work for Defendant.[5] As such, as Defendant did not have the minimum 20 employees for 2008 and 2009, Defendant is not subject to the ADEA such that this case must be dismissed. The Court agrees.

Plaintiffs argue that despite the undisputed facts for 2008 and 2009 from the Arizona Department of Economic Security that Defendant only paid a total of 19 individuals for performing full and part-time work for Defendant, the 20 employee requirement is still met on other grounds. Plaintiffs assert that because Defendant simply had 20 or more employees

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legislative history discussed in *Kelly*, *Palmer*, and *Monclova Township*. *See id.* at 5 n. 3.

[5] In 2008, Defendant had potentially 13 individuals work the requisite 20 weeks, and in 2009, Defendant had potentially 10 individuals work the requisite 20 weeks. In any event, in both 2008 and 2009, there were a total of 19 individuals that actually worked and received wages from Defendant.

listed on its payroll in 2008 and 2009 (i.e., the payroll list happened to include individuals who were reserve/seasonal and volunteer firefighters that performed no work and received no pay in 2008 and 2009), that fact alone is enough to meet the 20 employee requirement even if less than 20 individuals actually performed work and were paid by Defendant in 2008 and 2009. To support this argument, Plaintiff quotes the following statement from a Supreme Court case addressing the minimum employee requirement in Title VII:

> Metropolitan contends that if one were asked how many employees he had for a given working day, he would give as the answer the number of employees who were actually performing work on that day. That is possibly so. Language is a subtle enough thing that the phrase "have an employee for a given working day" (as opposed to "have an employee on a given day") may be thought to convey the idea that the employee must actually be working on the day in question. But no one before us urges that interpretation of the language, which would count even salaried employees only on days that they are actually working. Such a disposition is so improbable and so impossible to administer (few employers keep daily attendance records of all their salaried employees) that Congress should be thought to have prescribed it only if the language

> could bear no other meaning ... Under the interpretation we adopt, by contrast, all one needs to know about a given employee for a given year is whether the employee started or ended employment during that year and, if so, when. He is counted as an employee for each working day after arrival and before departure.

Walters v. Metropolitan Educational Enterprises, Inc., 519 U.S. 202, 208-211 (1997)(emphasis added); Plaintiffs' Response (Doc. 71) at p. 10; Plaintiffs' Reply in Support of Cross-Motion for Summary Judgment (Doc. 79) at p. 3.

A closer review of the *Walters* case shows that it does not support Plaintiffs' position. The *Walters* case dealt with a similar provision contained in Title VII of the Civil Rights Act of 1964 (dealing with race, sex, and national origin discrimination) which stated that Title VII only applies to an employer who "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." *Id.* at 204. The question presented was "whether an employer 'has' an employee on any working day on which the employer maintains an employment relationship with the employee, or only on working days on which the employee is actually receiving compensation from the employer." *Id.* This question arose because "Metropolitan's 'working days are Monday through Friday, and the 'current' and 'preceding' calendar years for purposes of the retaliatory-discharge claim are 1990 and 1989. The parties have stipulated that

Metropolitan failed to satisfy the 15-employee threshold in 1989. During most of 1990, Metropolitan had between 15 and 17 employees on its payroll on each working day; but in only nine weeks of the year was it actually compensating 15 or more employees on each working day (including paid leave as compensation). The difference resulted from the fact that Metropolitan had two part-time hourly employees who ordinarily skipped one working day each week." *Id.* at 205 (emphasis added). Due to the two part-time hourly employees who ordinarily skipped one working day each week (but, were nonetheless consistently performing work for Metropolitan and were actually being paid throughout 1990), Metropolitan argued that it was only compensating 15 or more employees on each working day for only nine weeks of the year, and therefore it should not be considered an employer covered by Title VII. As noted above, the Supreme Court rejected this position as reflected in the portion of the opinion quoted by Plaintiffs.

The Supreme Court emphasized, and the parties therein agreed, that the dispositive issue as to whether an employer had the minimum number of employees for the requisite 20 weeks was not whether an individual was being paid by the employer on a particular day, but whether the employer and the individual had an "employment relationship" on a particular day. *Id.* at 207. While the Supreme Court did state that an employment relationship is often "most readily demonstrated by the individual's appearance on the employer's payroll," the Supreme Court did not state that an individual is automatically considered an employee based solely on the fact that

the individual appears on the employer's payroll. *See id.* at 206-212. Furthermore, the Supreme Court certainly did not state that an individual appearing on an employer's payroll is considered an employee even if that individual did not perform work and receive pay from the employer during the pertinent time frame. *See id.* Thus, while an employment relationship is most often demonstrated by looking "first and primarily to whether the individual in question appears on the employer's payroll ... what is ultimately critical ... is the existence of an employment relationship ... under traditional principles of agency law ... [T]he ultimate touchstone ... is whether an employer has employment relationships with [the minimum number of employees required by the statute] for each working day in 20 or more weeks during the year[s] in question." *Id.* 211-212. In light of the foregoing, Plaintiffs' argument that the 20 employee requirement is met because Defendant had 20 or more employees listed on its payroll in 2008 and 2009 (i.e., including reserve and volunteer firefighters that performed no work and received no pay in 2008 and 2009) is rejected. Unlike the individuals in *Walters* who actually performed part-time work and were paid during the pertinent time frame, the individuals Plaintiffs seek to include to meet the 20 employee requirement did not perform work and get paid by Defendant in 2008 and 2009. Thus, just because these individuals happen to appear on Defendant's Unemployment Tax and Wage Reports from the Arizona Department of Economic Security does not show they had the requisite employment relationship for purposes of the ADEA (especially in the

circumstances at bar). Rather, there is no evidence of an employment relationship between Defendant and these individuals who did not perform work and get paid by Defendant in 2008 and 2009.

Lastly, Plaintiffs argue that Defendant's volunteer firefighters should be considered employees for purposes of the ADEA; if this were the case, the 20 employee requirement could be satisfied for 2008 and 2009. The only authority Plaintiffs cite to support its position is A.R.S § 23-901(d) which is a provision of Arizona's workers' compensation statute which simply includes volunteer firefighters in its definition of employees. This provision, however, does not establish that individuals listed as volunteer firefighters for Defendant are employees for purposes of the federal ADEA; Plaintiffs have not cited any case law to support their position that the volunteers at issue qualify as employees under the ADEA. Defendant, however, cites case law to support its position that the volunteers in this case do not qualify as employees under the ADEA.[6]

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[6] The parties have not cited, nor has the Court found, published Ninth Circuit case law on point dealing with the volunteer issues at bar. Defendant did cite a brief, unpublished Ninth Circuit case discussing whether a volunteer police officer could be considered an employee under Title VII. *See Waisgerber v. City of Los Angeles*, 406 Fed.Appx. 150 (9th Cir. 2010) (unpublished disposition). Although such unpublished authority is not precedent (*see* Ninth Circuit Rule 36-3), the Court notes that *Waisberger* stated that the plaintiff (an unpaid volunteer) could possibly amend her complaint to allege the "substantial benefits necessary to make her an employee under Title VII." *Id.* at 152. The *Waisberger* case involved unique circumstances where the trial court granted the defendant's motion to dismiss the

Courts have held that volunteers can potentially qualify as employees under federal discrimination statutes such as Title VII[7] where the volunteer is "entitled to significant [or substantial] benefits." *See Pietras v. Board of Fire Com'rs of Farmingville Fire Dist.*, 180 F.3d 468, 473 (2nd Cir. 1999) ("[T]he question of whether someone is or is not an employee under Title VII usually turns on whether he or she has received direct or indirect remuneration from the alleged employer ... [A]n employment relationship within the scope of Title VII can exist even when the putative employee receives no salary so long as he or she gets numerous job-related benefits ... We conclude ... that a non-salaried volunteer firefighter's employment status under Title VII is a fact question when that firefighter is entitled to significant benefits."); *U.S. v. City of New York*, 359 F.3d 83, 91-92 (2nd Cir. 2004)(To show that they were "employees" for purposes of Title VII, plaintiffs participating in New York's work experience program "must establish that [they] received remuneration in some form for [their] work ... This remuneration need not be a salary ... but must consist of substantial

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complaint where plaintiff's counsel did not oppose the motion or appear at the hearing; unbeknownst to the trial court and defense counsel at the time, plaintiff's counsel did not file an opposition or appear at the hearing because she was dying of brain cancer during the relevant period. *See id.* at 151.

[7] Title VII and the ADEA both define "employee" (in a very circular manner) as "an individual employed by an employer." 42 U.S.C. § 2000e(f) (Title VII); 29 U.S.C. § 630(f) (ADEA).

benefits not merely incidental to the activity performed...").

In *Pietras v. Board of Fire Com'rs of Farmingville Fire Dist.*, the plaintiff was a volunteer probationary firefighter (i.e., trainee) with the Farmingville Fire District; she alleged that the physical agility test that she was required to pass in order to become a full-fledged volunteer firefighter had a disparate impact on women. *See Pietras*, 180 F.3d at 470-71. Although she was not paid, the court held that there was an issue of fact as to whether Pietras could be considered an employee for purposes of Title VII as she "was entitled to numerous firefighter benefits [as a trainee which included]: 1) a retirement pension, (2) life insurance, (3) death benefits, (4) disability insurance, and (5) some medical benefits." *Id.; see also Haavistola v. Community Fire Company of Rising*, 6 F.3d 211, 221 (4th Cir. 1993) (finding that there was an issue of fact as to whether a volunteer firefighter was an employee under Title VII where she "received the following benefits ... with the Fire Company: state-funded disability pension ... survivors' benefits for dependents ... scholarships for dependents upon disability or death ... bestowal of a state flag to family upon death in the line of duty ... benefits under the Federal Public Safety Officers' Benefits Act when on duty ... group life insurance ... tuition reimbursement for courses in emergency medical and fire service techniques ... coverage under Maryland's Workers Compensation Act ... tax-exemptions for unreimbursed travel expenses ... ability to purchase, without paying extra fees, a special commemorative registration plate for private vehicles ... and access to

a method by which she may obtain certification as a paramedic.").

In *Jacob-Mua v. Veneman*, 289 F.3d 517, 521 (8th Cir. 2002)[8], the court held that a volunteer researcher with the Department of Agriculture could not be considered an employee under Title VII as she "was not paid, did not receive annual and sick leave benefits or coverage ... and she was not entitled to merit promotion, holiday pay, insurance benefits, or competitive status." The court also rejected her claim that the research and experience she obtained for her dissertation via her volunteer work counted as sufficient compensation to be considered an employee; the court found that case law did not support her position. *See id.* In *Evans v. Wilkinson*, 609 F.Supp.2d 489 (D.Md. 2009), the plaintiff was a volunteer emergency medical technician ("EMT") with the Lexington Park Volunteer Rescue Squad ("VRS"); the plaintiff alleged that VRS revoked her EMT privileges in violation of Title VII and the ADEA. *See id.* at 490. Although she received no salary, the plaintiff alleged that she qualified as an employee under the discrimination statutes because certain benefits were available to her which included a "Length of Service Program"; a first-time homeowner's assistance program; and a scholarship program. *Id.* at 494. The court found that these possible benefits were insufficient to qualify her as an employee under Title VII and the ADEA. As to the Length of Service Program, it provided that volunteers who have

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[8] Abrogated on other grounds, *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011).

reached the ages of 55 or 60, completed at least 20 years of certified active volunteer service, and had accumulated a minimum of 50 points per calendar year in volunteer service, would receive a monthly payment of either $125 or $175 for the remainder of their life; it also provided for monetary payments if the volunteer, who is otherwise eligible for the monthly payments, became disabled or died during the course of volunteer service. *Id.* at 494-495. In finding that this Length of Service Program was too conditional and minor to characterize the plaintiff as an employee, the court stressed "that monthly payments under this Length of Service Program are not guaranteed by any means; Plaintiff herself would be required to render a minimum of 20 years of additional certified active volunteer service in addition to accumulating a minimum of the 50 required points per calendar points in accordance with the program's description ... [T]he length of service program d[oes] not constitute the sort of guaranteed remuneration which establish[s] an employer-employee relationship ... [It does] not provide a guarantee of consideration for the work performed as it was not provided in a contemporaneous fashion, which result[s] in little or no economic dependence by most volunteer firefighters because one could forfeit the benefit by failing to reach the threshold age, completing the requisite number of years in service or earning the requisite number of points per year." *Id.* Likewise, as to the first-time homeowner's assistance program and scholarship program that were available to volunteers such as the plaintiff, volunteers still had to apply and qualify for these benefits which were not

by any means guaranteed to volunteers. The court found that the benefits at issue were too conditional and minor to qualify the plaintiff as an employee under Title VII or the ADEA. See *id.* at 494-496.

In the case at bar, Plaintiffs argue that volunteers for Defendant should be considered employees as they receive substantial benefits; for example, as referenced above, volunteer firefighters are included within the definition of employees in Arizona's workers' compensation statute, may receive a pension, and receive training and experience that could lead to full-time employment as a firefighter. The record reflects that most of the volunteers are either residents of Mount Lemmon, or young individuals looking for experience that could possibly lead to full-time employment with larger fire departments. While gaining experience through volunteering in the hope of obtaining full-time employment in the future is prudent, this is largely incidental to volunteer work in general, and is not a substantial benefit for purposes of being considered an employee under the ADEA based on the authority discussed herein. As to workers' compensation, there is no evidence or discussion of this issue in the record other than Plaintiffs pointing out that volunteers are included within the definition of employees under the pertinent statutory provision in A.R.S § 23-901(d). As to volunteers possibly receiving a pension, the pension at issue is very similar to the "Length of Service Program" discussed above in the *Evans* case. Arizona's volunteer pension provides a monthly pension not to exceed $400 based upon availability for volunteers who have served for 25-plus years, or who have reached age 60 and have served for 20-plus

years. *See* A.R.S. § 9-967(A). As pertinent to Defendant, the record reflects that there are a total of two volunteers who are receiving $125 per month relating to their volunteer service. In light of the foregoing, and as the volunteers at issue did not receive wages, health insurance, sick leave, or any other significant benefits from Defendant, the Court finds that Defendant is entitled to summary judgment as there is no material issue of fact supporting a finding that volunteers received substantial benefits from Defendant such that they could qualify as employees under the ADEA in this case. As Defendant did not have the required 20 employees during the relevant time frame, this case must be dismissed.

CONCLUSION

Accordingly, IT IS HEREBY ORDERED as follows:

(1) Defendant's motion for summary judgment (Doc. 68) is granted, and Plaintiff's cross-motion for partial summary judgment (Doc. 71) is denied.

(2) This case is dismissed with prejudice. The Clerk of the Court shall enter judgment and close the file in this case.

Dated this 11th day of December, 2014.

/s/ James A. Soto
Honorable James A. Soto
United States District Judge

APPENDIX C

29 U.S.C. § 630

§ 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or

employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively

seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between

a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the

duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

APPENDIX D

42 U.S.C. § 2000e

§ 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for

employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor

organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign

country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the

basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.